

Is the Crime in the Eye of the Beholder?

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In February 2017, in a decision which was quickly translated into English, the French constitutional council ruled as unconstitutional a law that prohibited the usual consultation of terrorist websites. A few days later, the Parliament reinstated a modified version of this offense. It was, however, struck down again by the Constitutional Council on December 15th 2017.

I. The Constitutional Council's ruling

The goal of Parliament was to prevent the indoctrination of individuals who may have gone on to commit terrorist acts. The Parliament wished to enable the authorities to intervene at the earliest stages. An individual should be stopped and punished before he takes his terrorist project to the next level.

This statute thus raised a classical problem of criminal policy, made only more stringent in the context of liberal democracies facing terrorism: the difficult balance between liberty and security. Criminal law can indeed intervene before the occurrence of the harmful consequence that the state wishes to prevent. But there has to be a limit to this approach: the most efficient way to avoid terrorist attacks would be to forbid everyone to leave their home.

The Constitutional Council ruled that the statute under review was an unnecessary restriction of freedom of expression. There were less severe means that could just as efficiently contribute to the prevention of terrorist acts and the protection of public safety. French law already contains many provisions allowing the competent authorities to stop an individual who is preparing a terrorist attack. There is no need to go further upstream, and to intervene at the stage of the consultation of websites, even before a terrorist intention can be identified.

The gap between, on the one hand, the act of usually accessing terrorist websites, and, on the other hand, the perpetration of a terrorist attack, seems too large. There is not a sufficient risk at this stage to justify criminalization. One cannot regard each usual viewer of such sites as a terrorist in the making.

II. The difference between the speaker and the reader

At first glance, this reasoning of the Constitutional Council – made more explicit here for the readers of this blog – seems convincing. A slight surprise stems from the fact that the French law governing freedom of expression does not reject the “bad tendency” test. In many statutes, there is no requirement for the offense to include a “clear and present danger” condition, according to which the feared consequence of speech will very likely happen. The reasonable estimation that the expression leads to an abstract danger is

enough. For instance, incitement to terrorism can be sentenced without verifying that the expression gives rise to a serious risk of terrorist acts being committed. The Constitutional Council does not seem to have any issue with such laws.

To understand the present ruling, one must keep in mind that there is a difference between restricting the freedom of expression of the speaker, and the much less frequent instance where the law targets the receiver of a message. Prohibiting access to the medium for expression implies that one assumes that each and every isolated reader is at risk of committing harmful acts as a result of his reading. By contrast, prohibiting certain expressions means only that there is a reasonable danger that some of its receivers will be moved to unlawful or violent acts. In other words, there is a higher abstract risk associated to the act of publishing a message than in the isolated act of reading it. The Constitutional Council refuses to assume that each usual reader of terrorist websites will probably take action, even if – as the statute also requested – his consultation is accompanied by the manifestation of adherence to the ideology expressed on the websites. Further indications of risk must appear, the individual must move closer to the preparation of an attack, in which case other laws already exist and can be applied.

III. Terrorists and paedophiles

The Constitutional Council did not pay any attention to a further element of the law, that could have led to another form of reasoning. The usual consultation of terrorist websites could lead to punishment only if those websites included “images or representations of [terrorist] acts that consist in voluntary attacks on life”. Therefore, focusing on the prevention of the harm likely to be inflicted by the reader of the websites might not be the only way to deal with this statute. The Constitutional Council could have focused on the harm to the participant, i.e. the harm endured by the victims of the acts whose pictures are included on the website. This line of reasoning is, for example, the only justification for the prohibition of the production, the distribution or the possession of child pornography in the United States. It should also be relevant for the consultation of websites depicting child pornography or beheadings and other murders.

However, this reasoning could not entirely apply to the law under review. Not only does this law targeted websites that display “pictures”, but it also referred to the mere “representation” of homicides, i.e. also the “virtual” representations of such acts. Justifying such laws by focussing on “participant harm” cannot apply in this case: this explains why the Supreme Court of the United States repealed the criminalisation of virtual child pornography.

Therefore, the commented decision of the Constitutional Council leads one to question the conformity to the constitution of article 227-23 of the criminal code, which served as a model to the repealed law. In its fifth paragraph, this article prohibits the “usual consultation” of websites that include pornographic “images or representations” of minors. The word “representation” was added to the law in 1998 with the express objective to include virtual child pornography. Clearly, then, the “participant harm” reasoning cannot apply. The law must be justified with reference to the harm that might be inflicted by an

individual as a consequence of his website consultation. Is this risk higher for a paedophile site than for a terrorist one? The Constitutional Council might well have to answer this question shortly.

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